

KEYWORD: Guideline C; Guideline B

DIGEST: An applicant with immediate family members living in a country hostile to the United States has a heavy burden to show that those family ties do not pose a security risk. There is a rebuttable assumption that an applicant has ties of affection and obligation to his or her immediate family members. The evidence in this case is consistent with that assumption. Favorable decision reversed

CASENO: 06-25202.a1

DATE: 02/22/2008

DATE: February 22, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-25202
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Joseph V. Kaplan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 22, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 14, 2007, after the hearing, Administrative Judge Leroy F. Foreman granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable security clearance decision is arbitrary, capricious, or contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant is a 44-year-old scientist employed by a defense contractor. He worked for his current employer since September 2005. He has never held a security clearance.

Applicant is highly regarded by his supervisor, who described him as goal-oriented, a team player, and a person who thrives on challenges. Military officers and civilians who worked with him as program managers repeatedly praised him for the quality of his reports and briefings.

Applicant was born in Iran. He has multiple siblings. His father was not well educated, but he wanted his children to have the opportunity for a college education. Some of Applicant’s siblings were educated in the U.S. One sibling came to the U.S. in the 1960s and has been a U.S. citizen since the 1980s. Other siblings also are naturalized U.S. citizens.

One of Applicant’s brothers returned to Iran after completing his education and now is the co-owner of a business in Iran. According to one of his siblings in the U.S., this brother regrets his decision to return to Iran, and he has applied for immigration to the U.S., where he hopes to retire.

Two of Applicant’s sisters declined the opportunity for education in the U.S., and they are now housewives in Iran. None of his siblings or their spouses are connected with the Iranian government or military. All his siblings in Iran own their homes and are financially secure.

Applicant’s family was targeted by the Iranian government because his father had supported the Shah. His parents died in the 1980s. After their death, the family continued to suffer harassment by the government.

Applicant became interested in studying physics, teaching himself by borrowing his sister’s books. He wanted to earn a college degree in physics, but he could not leave the country legally until he completed his military obligation. He fled Iran in the 1980s because his family was being

persecuted and he was about to be drafted by the Iranian Army to serve in the war with Iraq. He escaped by walking to another country, where he stayed for about nine months.

One of Applicant's brothers fled Iran at about the same time. This brother obtained a college degree in the U.S. and became a U.S. citizen.

Applicant was given refugee status by Canada. He chose Canada instead of the U.S. because it was easier to enter Canada. He obtained a bachelor's degree, a master's degree, a doctorate degree and became a Canadian citizen.

At the time Applicant entered Canada, one of his sisters was a citizen and resident of the U.S. and another sister was a permanent resident of the U.S. Applicant applied for residency status in the U.S., but his application was not granted until the late 1990s. He moved to the U.S. and became a U.S. citizen in 2005.

Applicant applied for an Iranian passport and returned to Iran in the late 1990s, looking for a wife. He stayed with his siblings. He testified that he "didn't have much luck in Canada," was lonely, and wanted to be married. Two unspecified "distant relatives" had daughters who were potential candidates for an arranged marriage. Applicant spent four to five weeks meeting with them, and he returned in the early 2000s to be married. He was subsequently divorced. His ex-wife has remarried and lives somewhere in the U.S. He has not returned to Iran since 2001.

Before his visit to Iran, Applicant paid the Iranian government to purchase an exemption from military service. He used one of his brothers to act as an intermediary. When he attempted to leave Iran, he was detained and held in jail for about 24 hours, until his sister in Iran posted bail, using her house as collateral. His Iranian passport was not returned to him until the Iranian authorities determined he was not involved in any anti-government activities. He does not know if he forfeited the bail posted by his sister.

Applicant testified he was unaware his possession of an Iranian passport raised a security concern until he received the SOR. He subsequently mailed his Iranian passport, which had expired, to the Iranian Interests Section of the Embassy of Pakistan. His passport was returned to him with a renewal application. He surrendered the passport again explaining that he did not desire to renew it. He testified at the hearing that he intended to renounce his Iranian citizenship. He renounced his Iranian citizenship after the hearing.

Applicant is now engaged to be married to a native of Iran who became a citizen and resident of the U.S. His fiancée's parents are deceased, and she has no family in Iran. She has a daughter who was born in the U.S. She has a brother who lives and works in the U.S. and a sister in Malaysia. The record does not reflect the citizenship of her siblings.

Applicant and his fiancée purchased a home in December 2006. Applicant also owns a partnership share of an office building. He has a 401(k) retirement account with his employer and an IRA.

Applicant testified he has no contact with his brother in Iran. They last spoke three or four years ago. He and his brother had disagreements about the division of property inherited from their father. He trusted his brother to sell the property and divide the proceeds, but his brother kept everything.

Applicant calls his sisters in Iran once a year, on the Iranian New Year. He is not close to his sisters in Iran, who are considerably older than he. He has several nieces in Iran, but he has no contact with them. When asked if he would travel to Iran if any of his siblings were ill or dying, he emphatically responded that he would not.

One of Applicant's sisters, a citizen of the U.S., testified Applicant is not a social person and has little contact with siblings in the U.S. Applicant testified he sees her and his older brother once every couple of months, but she testified she had not seen Applicant in five months. He is closer to his twin brother, whom he sees once every couple of weeks. He has not seen his other sister for two years.

Iran is a theocratic Islamic republic dominated by Shia Muslim clergy, with ultimate political authority vested in a learned religious scholar. Current U.S. concerns about Iran are based on its efforts to acquire nuclear weapons and weapons of mass destruction; support for and involvement in international terrorism; support for violent opposition to the Middle East peace process; and its human rights abuses, including summary executions, torture, arbitrary arrest and detention, and restrictions on civil liberties. Iran has provided guidance, training, and weapons to Shia political and militant groups in Iraq. It also provides encouragement, training, funding, and weapons to anti-Israeli terrorist groups in its efforts to undermine the Arab-Israeli peace process.

The U.S. has designated Iran as a state sponsor of terrorism. The U.S. broke diplomatic relations with Iran in April 1980, prohibits most trade with Iran, and uses multilateral sanctions and diplomatic pressure to contain the threats posed by Iran.

Iran does not recognize dual citizenship. As a result, Iranian-born, naturalized U.S. citizens are considered solely Iranian citizens by the Iranian authorities, and they are subject to surveillance, search, harassment, arrest, and imprisonment while traveling or residing in Iran.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent that the Judge's findings are relevant to the assigned error, they will be discussed below.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's favorable clearance decision is arbitrary, capricious and contrary to law because it does not examine relevant evidence, it fails to articulate a satisfactory explanation for material conclusions, and it fails to consider important aspects of the case. The Board finds Department Counsel's arguments persuasive.

The Board has previously noted that an applicant with immediate family members living in a country hostile to the U.S. has a heavy burden to show that those family ties do not pose a security risk. *See, e.g.*, ISCR Case No. 03-09053 at 4 (App. Bd. Mar. 29, 2006). In this case, the Judge's

analysis and conclusions are insufficient to support a favorable decision given that heavy burden of persuasion.

The Judge's favorable clearance decision is predicated in part on his conclusion that Applicant's loyalty and obligation to his two sisters in Iran is "minimal."¹ That conclusion is not sustainable in light of the rebuttable presumption that Applicant has ties of affection and/or obligation to his immediate family members and in light of all the contrary record evidence. The record indicates that, despite Applicant's claims that he is not close to his sisters in Iran, he has more than minimal contact and loyalty to them. He visited them for approximately one month each, after he had fled Iran to avoid family persecution and military service. In order to return, he had to pay the Iranian government to purchase an exemption from military service. One sister placed her house as collateral to bail Applicant out of jail during one of his trips. Contrary to the Judge's finding that Applicant "expressed no concern about the economic consequences of forfeiting bail when he left Iran . . . even though his sister had used her house as collateral," Applicant in fact testified that he did not know whether the Iranian authorities had returned his sister's house to her. Moreover, Applicant continues to regularly converse with his sisters by telephone once a year during the Iranian New Year.

The Judge's favorable clearance decision is also predicated in part on his conclusion that some of Applicant's family members reside in the U.S. and "his professional life, financial holdings, and his future are all in the U.S."² Facts such as those either do not readily suggest refutation, extenuation, or mitigation of the government's security concerns in cases such as this, or they have low probative value. *See, e.g.*, ISCR Case No. 04-00109 at 5 (App. Bd. Jul. 13, 2006); ISCR Case No. 02-22461 at 12-13 (App. Bd. Oct. 27, 2005). At the hearing, Applicant offered testimony as to his commitment to the U.S. and stated that "he would never do anything to hurt this country." However, an applicant's stated intention as to what he might do in the future in a hypothetical situation is merely a statement of intention that is entitled to limited weight, unless there is record evidence that the applicant has acted in a similar manner in the past in comparable circumstances, or that the applicant has a previous track record of complying with security regulations and procedures in the context of dangerous, high-risk circumstances in which he made a significant contribution to the national security. *See, e.g.*, ISCR Case No. 07-00029 at 4 (App. Bd. Dec. 7, 2007); ISCR Case No. 04-12363 at 2 (App. Bd. Jul. 14, 2006). Neither of those circumstances are present in this case. On the contrary, the record indicates that Applicant came to the U.S. from Canada in 2000, principally for personal and professional reasons, that he became a U.S. citizen in 2005, and that he has never before held a security clearance.

An applicant's testimony is evidence which the Judge must consider, and assessments of credibility and demeanor are entitled to deference on appeal. However, in his analysis of Applicant's feelings toward his sisters in this case, the Judge drew certain inferences from Applicant's demeanor

¹Decision at 8.

²*Id.*

that went beyond what was reasonably supported by the record, with respect to the extent to which Applicant's personality would insulate him from pressure, coercion, or duress. In that regard, the Judge gave unwarranted weight to facts such as: "Applicant's demeanor when talking about his siblings in Iran was detached and without emotion" and "He appears to live in an intellectual, unemotional world." Such inferences were largely speculative, and not a substitute for record evidence when concluding that Applicant's sense of loyalty and obligation to his sisters in Iran was "minimal."

Finally, the record in this case indicates that Applicant and his family members in Iran have previously been targeted by the regime for coercion, exploitation and pressure, and that Applicant was once detained by Iranian authorities. The Board has noted on several occasions that such factors are "... important evidence that provides context for all the other evidence of record and must be brought to bear on the Judge's ultimate conclusions in the case." *See, e.g.*, ISCR Case No. 04-07766 at 3 (App. Bd. Sep. 26, 2006); ISCR Case No. 04-02511 at 5 (App. Bd. Mar. 20, 2007); ISCR Case No. 05-03279 at 4 (App. Bd. Sep. 20, 2007). The Judge's analysis of the security significance of Applicant's situation contains no discussion of this important aspect of the case, a circumstance which renders his overall favorable decision unsustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board